UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOWE'S HOME CENTERS, LLC

and **Case 19-CA-191665**

AMBER DAWN FRARE, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. Overview

Pursuant to § 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Counsel for the General Counsel ("General Counsel" submits this Answering Brief to Lowe's Home Centers, LLC ("Respondent") Exceptions to the decision of Administrative Law Judge Tracy ("ALJ") on April 17, 2018 ("ALJD"), in the above-captioned case.[1] The ALJ found that the Respondent violated § 8(a)(1) of the National Labor Relations Act (the "Act") by maintaining nationwide two iterations of an unlawfully overbroad confidentiality rule prohibiting employees from discussing salary information.[2] Respondent excepts to both the legal and factual findings made by the ALJ, as well as the remedy ordered. (R. Br. R. 6-9, 16-19).

II. The ALJ Properly Found that Respondent Violated § 8(a)(1) by Maintaining Overbroad Confidentiality Rules in its Original and Revised Versions of its Code of Business Conduct and Ethics

The ALJ properly found Respondent's maintenance of a confidentiality rule in two versions of its Code of Business Conduct and Ethics ("Original Code"[3] and "Revised

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[1] The Brief in Support of Respondent's Exceptions to the ALJD will be referred to as (R. Br.) with citations to specific page numbers. References to the Stipulation of Facts will be designated as (SF__;__), including appropriate page and paragraph citations. References to the exhibits will be referred to as Ex.

[2] As this case is to be decided based on a stipulated record, this Answering brief does not recite the entire procedural history of this case. However, the ALJ addresses the procedural history very thoroughly and accurately on pages 1 and 2 of her decision. (ALJD 1-2: 8-16).

[3] The Original Code states:

> Employees must maintain the confidentiality of information entrusted to them by Lowe's or its suppliers or customers, except when disclosure is authorized by Lowe's General Counsel and Chief Compliance Officer or disclosure is required by law, applicable governmental regulations or legal proceedings. Whenever feasible, Employees should consult with the company's General Counsel and Chief Compliance Officer before disclosing confidential information if they believe they have a legal obligation to do so.
>
> Confidential information includes all non-public information that might be of use to competitors of the company, or harmful to Lowe's, its suppliers or customers, if disclosed. It includes all proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records and *salary information*.

Code,"[4] respectively; collectively, the "Ethics Code") violates § 8(a)(1) as a category 3 rule under *Boeing, 365* NLRB No. 154 (2017). (ALJD 2:39-40; 3:32-34; 7:20-34). This finding was legally sound, as the confidentiality rule expressly prohibits the discussion of "salary information" and all of Respondent's employees are subject to discipline for failing to comply with its requirements. (ALJD 4:9-10; 28-29; Ex. G p. 3; Ex. 13 p.7).

Third category rules under *Boeing* encompass "rules that the Board […] designate[s] as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." *Id.* slip op at 4 (emphasis in original). It is well-settled law that employees have the right to discuss wages and other terms and conditions of employment with each other as well as other non-employees, such as Board agents, union representatives, and the ALJ relied upon the appropriate cases in finding that employees have a right to discuss wages with each other as well as others. (ALJD 6-7; 27-15). *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 slip op at 7 (2014); *Big Foods*, 347 NLRB 425, 425 n.4 (2006); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999); *Waco, Inc.*, 273 NLRB 746, 748 (1984).

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[4] The Revised Code states:

> Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.
>
> Confidential information includes, but is not limited to:
>
> - Material, non-public information; and
> - Proprietary information relating to Lowe's business such as a customer, budget, financial, credit, marketing , pricing, supply cost, personnel, medical records or *salary information*, and future plans and strategy.

In fact, this right is so well settled that the *Boeing* decision itself notes that "[a]n example of a Category 3 rule would be a rule prohibiting employees from discussing wages or benefits with one another." *Id.* As this confidentiality rule prohibits the discussion of salary information a term and condition of employment, it falls directly under Category 3 in *Boeing,* and must be found unlawful. Accordingly, the ALJ's decision is legally sound.

Nevertheless, Respondent excepts the ALJ's finding on the following grounds: (1) its confidentiality rule is facially neutral and cannot be reasonably construed to impose on § 7 rights; and (2) the rule serves important business justifications that substantially outweigh any impact on protected rights. (R. Br. 9). Respondent's exceptions are without merit.

In support of its assertion that its Confidentiality rule is facially neutral, Respondent asserts that there is no direct evidence in the record of infringement upon § 7 rights.[5] As the ALJ pointed out in her decision, this assertion mistakes the type of allegation alleged. (ALJD 7 n.6). The Complaint does not allege that the confidentiality rule was promulgated in response to protected activity or that it was applied to restrict protected activity. (Ex. 10). Rather, the Complaint alleged a rule maintenance violation. (EX. 10) Such violations have long been recognized by the Board. *See, e.g., Republic Aviation Corp. v. NLRB*, 324 US 793 (1945). *Boeing* did not do away with the maintenance violation as

[5] Although Respondent claims that there is no evidence on the record that none of its employees were disciplined or discharged because they engaged in their § 7 right to discuss wages and other terms and conditions of employment (R. Br. 11), this representation is decidedly disingenuous and misleading. Paragraph 6 of the Complaint alleged that Respondent discharged its employee Amber Frare and issued employee Christa Walker a final written warning for discussing wages. (Ex. E). Since these allegations were settled before hearing and there are no facts in the record, it is true they are not before the Board. However, in light of the settlement pre-hearing, not only is it decidedly misleading for Respondent to make its assertion about there being no evidence, but it is also disingenuous factually.

Respondent seems to infer; it merely altered the test used to categorize the rules at issue. *Id.* slip op at 3-4.

Next Respondent asserts that the ALJ was only able to find a violation by improperly interpreting the vagueness in the confidentiality rule against Respondent. (R. Br. 11-12). Respondent avers that the ALJ should have construed the rule to only protect confidential and proprietary information without infringing upon § 7 rights. (R. Br. 11-12). However, as the ALJ correctly pointed out, such an interpretation is at odds with the wording of the rule, as the rule does not state that its prohibitions are limited to the sharing of information with competitors, but rather states that it applies where the sharing may be "harmful to Lowe's[.]" (ALJD 7:5-10). Apart from this being quite a stretch, Respondent's argument is fatally flawed because its own Ethics Code contains a separate section on fair dealing and fair competition (Ex. G, p2.; Revised Code Ex 13 p.6). Under the rules of construction where interpretations that result in redundancy are to be avoided, the provision in the Ethics Code preventing the sharing of information that may lead to unfair competition means that it is reasonable to assume that the confidentiality rule at issue here applies in other cases aside from unfair competition. *See, e.g., Oakwood Healthcare, Inc*., 348 NLRB 686 (2006) (the proper manner to interpret § 2(11) of the Act is to examine the words and then carefully interpret them so as to avoid redundancy).

Respondent's claim that the ALJ did not give proper weight its business justification is also without merit, as her finding was well based in law. This assertion misreads and misrepresents the decision, as the ALJ found that Respondent simply failed to establish any evidence in support of its claim that it had a legitimate justification. Indeed, while the ALJ noted that Respondents claimed that it needed the confidentiality provision to prevent

business insider trading, unethical business conduct, and unfair competition, it failed to present evidence of this despite being given an opportunity to reopen the record. (ALJD 7-8; 37-14). Thus, there was simply no legitimate justification to afford any weight.

Even assuming that there had been some evidence proffered of an actual justification for the rule, it would not rise to the level necessary to lawfully maintain the confidentiality rule. For example, in *G4S Secure Solutions, Inc.*, 364 NLRB No. 92 (2016), a decision issued prior to *Boeing*, a rule which prohibited the discussion of salary information was found to be unlawful despite Respondents concerns of unfair competition. *Id*. Member Miscimarra, the architect of the *Boeing* rubric, wrote a concurrence in this decision and he analyzed the prohibition on the discussion of salary information using the balancing test that later became law in *Boeing*, as follows:

> Respondent has a legitimate interest in keeping its wage and salary structure out of its competitors' hands. However, wage and salary information relates to core rights under the NLRA, especially in relation to sharing of such information among employees or between employees and potential union representatives. The Board may take notice that restrictions on sharing wage and salary data have been relied upon by employers at various times to prevent employees from engaging in NLRA-protected activity. Accordingly, for the above reasons, I concur in my colleagues' finding that the Respondent violation NLRA Section 8(a)(1) by maintaining a rule prohibiting employees from discussing 'wages and salary information.'

Id. slip op at 10.

Thus, even if Respondent was concerned with keeping is wages and salary information out of its competitors' hands, this alone constitutes an insufficient justification given the nature and extent of the very high potential impact on its employee rights to discuss their wages – a protected right. Thus, the potential harm to employee rights would not be outweighed by Respondent's justification that the rule is necessary to

prevent unfair business practices. Accordingly, the ALJ's decision should be affirmed and adopted.

III. The ALJ's Remedial Order Appropriately Addresses the Violations Found

As discussed above, the ALJ properly found Respondent's two iterations of its Confidentiality Rule, which are maintained electronically covering its stores nationwide, to violate § 7 of the Act. (ALJD 9:26-31). Consistent with Board law, the ALJ found that a nationwide posting was required in order to remedy the violation. (ALJD 9:28-29). *See Guardsmark, LLC*, 344 NLRB 809, 812 (2005) (finding a nationwide posting to be the appropriate remedy where unlawful rules maintained on a nationwide basis)

Respondent contends that, even if the confidentiality rule in its Ethics Code were to be found to violate § 8(a)(1) of the Act, it should not be required to post a remedial notice because it rescinded the confidentially provision in August of 2018. (R. Br. 16). Respondent also contends that it should be permitted to reopen the record to supplement it with respect to the details of its claimed rescission. (R. Br. 18 n.14). Respondent's arguments are without merit.

Even if it were to be assumed that Respondent simply rescinded the confidentiality provisions in its Ethics Code in August of 2018, such belated actions are insufficient to cure the violation and a Notice to Employees is still required. In *Passavant Memorial Hosp.,* 327 NLRB 138-39 (1978), the Board set forth the criteria required for effective repudiation under the Act – it must be: (1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other prescribed illegal conduct; (5) adequately publicized to the involved employees; (6) in an environment where the employer has not

engaged in proscribed conduct after the publication; and (7) and with assurances by the employer to its employees that it will not interfere with § 7 rights in the future.

Ticking through the Board's criteria for assessment, even if Respondent rescinded the rule in August of 2018, such action does not satisfy the Board's *Passavant* factors at all. In fact, it does not even get past the first factor – timeliness. Temporally, it would be far too late to be considered timely, as the charge was amended to include the unlawful rule on February 1, 2017, some 20 months before any remedial action was supposedly taken. (ALJD 1:10-12; SF 3:3) Traditionally, the repudiation, in order to be effective, has to come on the heels of the violation. *See Passavant,* 327 NLRB at 139 (repudiation 7 weeks after the occurrence of the unfair labor practice conduct to be too long to be remedied without a Board notice). While the Board has recently loosened this requirement, allowing slightly more time for a charged party to implement a remedy after a charge has been filed (*see, e.g., TBC Corp. & TBC Retail Group, Inc*., 367 NLRB No.18, slip op. at 2 (2018) (timely repudiation of an unlawful rule when it occurred a month and a half after the charge was filed), there is no way that almost 2 years satisfies that loosened standard.

The fact that the alleged repudiation came on the heels of an ALJ decision speaks to the quality of the untimely repudiation as well. It was certainly not in the spirit of *Passavant.* Moreover, simply removing the rule does not address any other the other factors, as no one seems aware of Respondent's asserted repudiation.

Respondent's argument that "implementing the ALJ's remedy and recommended order … would only serve to dis-incentivize … proactive changes by employers" is equally without merit. (R. Br. 18). As an initial matter, it is unclear to which employers refers. Second, allowing Respondent to call its alleged secret rescission remedial under circumstances where it waited almost 2 years after the filing of the charge and 4 months after the issuance of the ALJ's decision finding a violation, would only serve to incentivize employers to not resolve unfair labor practices as soon as they come to their attention. Indeed, the very case that Respondent relies upon for its position, *Landry Inc*., 362 NLRB No. 69 (2015), demonstrates how quickly an employer must move to effectively rescind an unlawful policy, once it comes to its attention: two months prior to the charge being filed. *Id.* slip op at 1.

Respondent's reliance on Member Johnson's dissent in *Boch Honda*, 362 NLRB No. 83 (2015), concerning a successful repudiation of a rule, is equally misguided. (R. Br. 17). In *Boch Honda*, a Board majority found that the respondent had failed to effectively repudiate an overbroad social medial rule. However, Member Johnson dissented to that opinion, noting that the respondent had taken great pains to cooperate with the region to find an appropriate remedy and all of the violations "were based on perceived ambiguities in language" . . . "not that they explicitly restricted § 7 activity." *Id.*, slip op at 6. Unlike in that case, here there is no ambiguity, no Regional cooperation to find an appropriate remedy, and, as the *Boeing* decision made clear, the unlawful confidentiality rule directly implicates § 7 rights.

Respondent also argues that ALJ's Recommended Order is somehow confusing[6] because: (1) the problematic rule was already rescinded; and (2) Respondent is forced to reprint a document no longer in use. (R. Br. 17). Respondent is grasping, as the wording of the Order specifically describes the affirmative actions Respondent must take in order to effectuate the policies of the Act. (ALJD 10-11: 37-19). Those actions are: (1) rescind the rule; (2) furnish the employees with inserts to its Ethics Code advising employees that the unlawful rules have been rescinded; (3) post a notice; and (4) within 21 days after service by the Region file with the Regional Director a sworn certificate attesting to the steps that the Respondent has taken to comply. (ALJD 10-11: 37-19). This is hardly confusing, and Respondent, contrary to its claims, is not required to "reprint" the policy it allegedly rescinded.

Finally, Respondent argues that nationwide notice posting is remedy is overbroad and punitive.[7] (R. Br. 19). As the ALJ's decision makes clear, the nationwide posting was ordered due to the fact that Respondent maintained the unlawful rule on a nationwide basis, a fact it stipulated to. (ALJD 9:27-29; SF 6-8:20, 23). As discussed earlier, nationwide violations require nationwide remedies.

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[6] Respondent also claims that the "ALJ does not delineate which words or phrase contained in the confidentiality provision violate the Act." (R. Brf. 18). This claim is inconsistent with the ALJD, as it explicitly states "the Confidential Information rule precludes discussion of salary information. In addition, employees face discipline if they violate the Confidential Information rule in the Original and Revised Code. Therefore, the Confidential Information rule is unlawful." (ALJD 7:15-19). Hence, it is explicitly clear that the ALJ found the prohibition of the discussion of "salary information" to be the unlawful part of the rule.

[7] Respondent also counters that it should not be required to post a notice because there is no allegation or evidence that any employee has been disciplined for violating the confidentiality rule. (R. Br. 19). *See* discussion in note 5 above.

IV. Conclusion

Based on the foregoing, it is respectfully submitted that the Board should deny Respondent's Exceptions in their entirety and adopt the ALJ's proposed order based on her findings of fact and conclusions of law that Respondent violated § 8(a)(1) of the Act.

Dated at Seattle, Washington, this 17th day of December, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge was served on the 17th day of December, 2018, on the following parties:

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